Public Prosecutor v Jorge Enrique Pellon Tellon

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B-05-59 OF 1997
LAMIN PCA, AHMAD FAIRUZ AND DENIS ONG JJCA
21 JULY 1998

Criminal Procedure *— Charge — Alteration or amendment of — Accused charged with trafficking in dangerous drugs — Trial judge amended charge to that of possession while in transit — Whether trial judge was correct in amending charge — Whether trial judge was usurping functions of Attorney General — Whether charge should be one of trafficking*

The respondent ('the accused') was a Peruvian on a flight from Buenos Aires to Indonesia via Kuala Lumpur. He was to leave Kuala Lumpur through Terminal One almost immediately upon arrival. The accused passed through a detector at a departure gate and after a body search, nine packages of cocaine were found strapped to his inner short pants which weighed 1,846.4gm. The accused was then taken to the Damansara Utama police station and upon being bodily examined again, two more packages of cocaine weighing 414.8gm were found in his shoes. The accused was charged with two charges of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act').

In the High Court, the trial judge, at the end of the case for the prosecution, amended the two charges as preferred by the prosecution under s 39B(1)(a) of the Act to an offence under s 21(6) of the Act. The accused was sentenced to three years' imprisonment which was to take effect from the date of arrest in respect of each charge. The Public Prosecutor appealed against the amendment of the charges and the sentences imposed. The senior federal counsel submitted that the drugs found in the accused's shoes at the police station should be part of the drugs discovered at the airport and that there should only be one charge. He said that the offence must be that of trafficking and not one under s 21(6) of the Act which is the offence of being in possession while in transit. He further submitted that the Public Prosecutor had complete discretion to prefer whatever charge he thought proper.

Held, dismissing the appeal and confirming the sentence:

The trial judge amended both charges after all the evidence that the prosecution could produce to prove its case were put before him. He had made a proper finding as to the evidence and the correct application of the law and was right in amending both the charges at this stage. He did not usurp the functions of the Attorney General. While he is still holding court and not yet functus officio, the law gives the trial judge the right to disagree with the Attorney General and to state his view as the finding of the court. In the present case, he was satisfied that the offence as described in s 21(6) of the Act had

been proved at the end of the case for the prosecution and so he amended both charges as he did (see pp 189I and 190A–D).

Moreover, the drug was not accompanied with any form of authorization papers and there was no evidence that the drug was physically being distributed anywhere in the airport before the arrest or for the purpose of distributing locally. Further, the Act neither stipulates nor describes the manner by which the drug is to be brought or carried into the country. Therefore, there may not have been any intention to traffic in Malaysia.

When a dangerous drug is 'in transit', the amount is irrelevant because it is completely a different kind of act and offence. It is an offence of being 'in transit' without being accompanied with valid authorization. The meaning of being 'in transit' is for the sole purpose of being carried to another country and not for distribution and consumption in Malaysia. Therefore, the presumption of trafficking cannot arise (see p 193E–I).

[Bahasa Malaysia summary

Penentang ('tertuduh') merupakan rakyat Peru yang dalam penerbangan daripada Buenos Aires ke Indonesia melalui Kuala Lumpur. Beliau akan meninggalkan Kuala Lumpur melalui Terminal Satu sejurus setelah ketibaan. Tertuduh telah melepasi alat pengesan di pintu keluar dan selepas pemeriksaan badan dilakukan, sembilan bungkusan kokain seberat 1,846.4gm telah dijumpai terikat pada bahagian dalam seluar pendeknya. Tertuduh telah kemudiannya dibawa ke balai polis Damansara Utama dan setelah diperiksa badannya sekali lagi, dua lagi bungkusan kokain seberat 414.8gm telah dijumpai dalam kasutnya. Tertuduh telah dituduh dengan dua pertuduhan mengedar di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut').

Di Mahkamah Tinggi, pada penghujung kes pihak pendakwa, hakim perbicaraan telah meminda kedua-dua pertuduhan sepertimana yang dihendaki oleh pihak pendakwa di bawah s 39B(1)(a) Akta tersebut kepada suatu kesalahan di bawah s 21(6) Akta tersebut. Hukuman pemenjaraan selama tiga tahun telah dijatuhkan ke atas tertuduh yang mana akan berkuatkuasa daripada tarikh penahanan bagi setiap satu tuduhan. Pendakwa Raya telah merayu terhadap pindaan tuduhan-tuduhan tersebut dan hukuman yang dikenakan. Peguam kanan persekutuan berhujah bahawa dadah yang dijumpai dalam kasut tertuduh di balai polis seharusnya merupakan sebahagian daripada dadah yang telah dijumpai di lapangan terbang dan bahawa seharusnya hanya terdapat satu pertuduhan. Beliau berkata kesalahan adalah semestinya mengedar dan bukannya kesalahan di bawah s 21(6) Akta tersebut yang mana adalah kesalahan mempunyai dalam milikan ketika dalam transit. Beliau selanjutnya berhujah bahawa Pendakwa Raya mempunyai budi bicara yang menyeluruh untuk memilih apa pun pertuduhan yang beliau anggapkan wajar.

Diputuskan, menolak rayuan dan mengesahkan hukuman:

Hakim perbicaraan telah meminda kedua-dua pertuduhan setelah kesemua keterangan yang boleh dikemukakan oleh pihak pendakwa untuk membuktikan kesnya dikemukakan di hadapannya. Beliau telah membuat keputusan yang sempurna berhubung dengan keterangan dan pemakaian undang-undang yang sepatutnya serta telah bertindak dengan betul tatkala meminda kedua-dua pertuduhan di peringkat ini. Beliau tidak merampas fungsi-fungsi Peguam Negara. Ketika beliau masih bersidang dan belum lagi functus officio, undang-undang memberikan hakim perbicaraan hak untuk tidak bersetuju dengan Peguam Negara dan menyatakan pendapatnya sebagai keputusan mahkamah. Dalam kes ini, beliau berpuas hati bahawa kesalahan sepertimana yang disifatkan dalam s 21(6) Akta tersebut telah dibuktikan di penutup kes bagi pihak pendakwa dan dengan yang demikian beliau telah meminda kedua-dua pertuduhan tersebut sepertimana yang telah dilakukan olehnya (lihat ms 189I dan 190A–D).

Lagipun, dadah tersebut telah tidak diiringi oleh apa-apa bentuk kertas kebenaran sekalipun dan tidak terdapat sebarang keterangan bahawa dadah itu sedang diedarkan secara fizikal di mana-mana di lapangan terbang sebelum penangkapan atau bertujuan untuk diedarkan dalam negeri. Selanjutnya, Akta tersebut tidak menetapkan mahupun menerangkan cara bagaimana dadah tersebut seharusnya dibawa masuk ke dalam negeri. Dengan itu, berkemungkinan tiada sebarang niat untuk mengedarkannya di Malaysia.

Ketika dadah berbahaya sedang 'dalam transit', jumlahnya adalah tak relevan kerana ia merupakan suatu perbuatan atau kesalahan yang berlainan sama sekali. Ia merupakan satu kesalahan tanpa diiringi oleh kebenaran yang sah ketika 'dalam transit'. Maksud 'dalam transit' ialah bertujuan semata-mata untuk dibawa ke negara yang lain dan bukannya untuk pengedaran serta digunakan di Malaysia. Dengan itu, tanggapan mengedar tidak boleh berbangkit (lihat ms 193E–I).]

Notes

For cases on alteration or amendment of charge, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 615–656.

Cases referred to

Lau Chi Sing v PP [1989] 1 MLJ 5 (refd)
Lew Cheok Hin v R [1956] MLJ 131 (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152 (refd)
Ng Kwok Chun & Anor v PP [1993] 1 SLR 55 (refd)
PP v Heng You Nang [1949] MLJ 285 (refd)
Wong Siak Fon v PP [1972] 1 MLJ 203 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 158, 173(h), 376(1)
Dangerous Drugs Act 1952 ss 2, 19, 20, 21, 22, 37(da), 39A(2), 39B(1)(a)
Federal Constitution art 145(3)
Misuse of Drugs Act (Cap 185) ss 2, 5(a), 7 [Sing]

Appeal from: Criminal Trial Nos 47–3 and 47–4 of 1997 (High Court, Shah Alam)

Mohd Yusof bin Hj Zainal Abidin (Attorney General's Chambers) for the appellant.

Karpal Singh (*Karpal Singh & Co*) for the respondent.

Lamin PCA (delivering judgment of the court): This is an appeal by the learned Public Prosecutor against the decision of the learned judge of the High Court at Shah Alam made on 13 August 1997 whereby at the end of the case for the prosecution, the learned judge amended the two charges as preferred by the prosecution under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') respectively to an offence under s 21(6) of the said Act. He was sentenced to three years imprisonment which was to take effect from the date of arrest (26 November 1996) in respect of each charge. They were to run concurrently. The appeal is against the amendment of the charges and the sentences as imposed.

We began hearing this appeal on 13 July 1998 and continued on 21 July 1998 and on that day we dismissed the appeal against both the conviction and sentence.

For ease of reference throughout our judgment, we will refer to the respondent as the accused. The accused is a young Peruvian national named Jorge Enrique Pellon Tellon. He was on a flight from Buenos Aires to Den Pasar, Bali, Indonesia via Kuala Lumpur. He left Buenos Aires on 24 November 1996. This is borne out by his air ticket (P26) issued by Malaysia Airlines. He arrived by Malaysia Airlines flight number MH202 and landed at Terminal One, Sultan Abdul Aziz Shah Airport ('LTSAAS'). He was obviously in transit. (This is indicated by the top portion of the special pass (P28) issued to him on 26 November 1996 where it was also written his arrival flight number MH202.) He was to leave for Den Pasar on 26 November 1996 by Malaysia Airlines flight number MH715 departing at 9.20am. (His air ticket (P26) and of course his boarding pass (P25) bear testimony.)

Further evidence that he did not intend to enter West Malaysia is shown by his air ticket (P26) which states that he left Buenos Aires for Kuala Lumpur by Malaysia Airlines flight number MH202 on 24 November 1996 at 8.35pm and of course he landed at Terminal One. He was to leave Kuala Lumpur through Terminal One (as his tickets suggest from the marking 'T1') almost immediately upon arrival. Further, his passport was not endorsed by the Malaysian Immigration for entry into West Malaysia. PW5's evidence in court also clearly states 'Bukan datang ke Malaysia'.

A The special pass (P28) was issued to him for the purpose of authorizing him to properly leave the transit area of the airport and to 'enter' West Malaysia so as to enable the police to bring him to the Damansara Utama station for detention (see p 37 of the appeal record).

Now, any passenger before immediately boarding a plane must pass
B through a 'walk-through detector' at a departure gate which the accused did at about 8.35am, at gate 13 of Terminal One LTSAAS. It was at this gate after a 100% body search conducted by PW5 (except the inside of his shoes) that nine packages of cocaine were found strapped to his inner short pants which, after analysis by the chemist (PW4), weighed 1,846.4gm. This formed the subject matter of the original second amended charge
C under s 39B(1)(a). It reads:

> Amended charge 2
>
> That you on 26 November 1996 at about 8.35 in the morning, at gate 13 Terminal One, Sultan Abdul Aziz Shah Airport, in the district of Petaling, in the state of Selangor, did traffic in dangerous drugs, to weight 1,846.4gm
D of cocaine and you have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the said Act.

At about 12.35pm, the accused was taken from Balai Polis LTSAAS to Balai Polis Damansara Utama and before he was put into the police lock-
E up he was again bodily examined by Constable Mohd Rozi (PW7) who discovered in his shoes two more packages of cocaine which, after analysis, weighed 414.8gm. This became the subject matter of the first amended charge for the offence of trafficking under s 39B(1)(a) which reads:

> Amended charge 1
>
F That you on 26 November 1996 at about 1.20 noon, at Damansara Utama police station, Damansara, in the district of Petaling, in the state of Selangor, did traffic in dangerous drugs, to wit 414.8gm of cocaine and you have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Acts 1952 and punishable under s 39B(2) of the said Act.

G We are of the view that the learned trial judge was right in making the amendments that he did. Firstly, in amended charge No 1, it cannot be right to state that the trafficking was at Damansara Utama police station because the accused was not on his own free will at the police station. It was the police who brought him there. The venue for this transaction would still be gate 13. Before us, the learned senior federal counsel
H conceded that the drugs found in the accused's shoes at the Damansara Utama police station should be part of the drugs discovered at gate 13 and that there should be one charge. But he insisted before us, as did his colleague before the trial judge below, that the offence must still be that of trafficking and not one under s 21(6) of the Act which is the offence of being in possession while in transit. He submitted that the learned Public
I Prosecutor had complete discretion to prefer whatever charge he thought proper. He gave us the impression that once the Public Prosecutor had exercised his discretion to prefer a particular charge against a suspect, the court would have no power to amend even after hearing the evidence. We

are well aware of his discretionary powers as spelt out in s 376(1) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') read with art 145(3) of the Federal Constitution. We reproduce below both the provisions for ease of reference. Section 376(1) of the CPC reads:

> The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the Code.

Article 145(3) of the Federal Constitution reads:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

The Federal Court had occasion to express its view on the above provisions in the case of *Long bin Samat & Ors v PP* [1974] 2 MLJ 152. Suffian LP (as he then was), delivering the judgment of the court, said at p 157:

> The first of these provisions is sub-s (i) of s 376 of the Criminal Procedure Code which provides:
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> > 'The Attorney General shall be the Public Prosecutor and shall have the control and directions of all criminal prosecutions and proceedings under [the Criminal Procedure Code].'
>
> and from this it would appear that the Public Prosecutor has a discretion as to what charges should be preferred, subject of course to the power of the court to amend charges in the course of a trial. That the law intends to give a wide discretion over criminal prosecutions to the Public Prosecutor appears from other provisions of the Criminal Procedure Code providing that for prosecution of certain offences his complaint is required (s 130) and yet for other offences his written sanction (s 129).

At p 158:

> On independence the Federal Constitution came into force, and cl (3) of its art 145 (as amended) provides:
>
> > 'The Attorney General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for the offence, other than proceedings before a Muslim court, a native court or a court-martial.'
>
> In our view, this clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pp 32–33 in *Smedleys Ltd v Breed* [1974] 2 All ER 21. Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.

A person is brought before a court of law on a charge at the instance of the honourable Attorney General (or any other official exercising the powers

of the Attorney General properly delegated under law) for he is the only person recognized by the Federal Constitution to have the power 'to institute' any proceedings for an offence in a civil court. He has, however, no power to institute proceedings before a syariah court, a native court or a court martial. When a charge is first read to an accused at the commencement of a trial, it must be the charge that has been framed by the prosecution for at that stage it is only the prosecutor who knows his case. This is subject, of course, in the words of Suffian LP (as he then was), to the power of the court to amend the charges in the course of a trial. A subordinate court has the power to amend the original charge only at the stage as indicated in s 173(h) of the CPC. Section 173(h) reads:

> (1) If the Court finds that a prima facie case has been made out against the accused on the offence charged, the Court shall call upon the accused to enter on his defence.
>
> (2) If the Court finds that a prima facie case has been made out against the accused on an offence other than the offence charged which such Court is competent to try and which in the opinion of the Court it ought to try, the Court shall amend the charge.

As to the operation of this provision, I find no better guide than the view expressed by Spencer Wilkinson J in the case of *PP v Heng You Nang* [1949] MLJ 285 at p 287 thus:

> Under s 173(h), subordinate courts have a duty to consider the charge and amend it if necessary. Nevertheless I do not think that this section makes it incumbent on the court to search the law for offences which an accused person *may* have committed. It is for the prosecution to decide what their real complaint against the accused is and to frame their charges or to submit amendments accordingly. No doubt, in a clear case, a president or a magistrate ought to alter a charge to fit the proved facts; but if the prosecution is unable to reach a conclusion as to the proper charge, which appears to have been the position in this case, it is in my view quite improper to criticize the president for failing to carry out the function of the prosecution officer.

The general power of amending or even adding a charge with which the court is vested under the CPC is found in s 158 and it reads:

> Court may alter or add to charge
>
> (i) Any Court may alter or add to any charge at any time before judgment is pronounced ...
>
> (ii) Every such alteration or addition shall be read and explained to the accused.

It says that this can be done at any time before judgment. But the best time to do so is at the close of the evidence for the prosecution. It is at that stage that the court is in the best position to decide exactly the case which the accused is required to meet: *Lew Cheok Hin v R* [1956] MLJ 131; *Wong Siak Fon v PP* [1972] 1 MLJ 203.

In the present case, the learned trial judge amended both the charges not only at the end of the case for the prosecution but after having heard

the submissions of both learned counsel for the defence and the learned deputy public prosecutor. In other words, all the evidence both oral and documentary that the prosecution could produce to prove its case were before the learned trial judge together with addresses by both counsel on how the evidence is to be perceived and the law to be applied. The learned trial judge certainly at that point of time had the best opportunity to make a proper finding. Of course, whether he did make a proper finding is another matter. However, with respect, we are of the view that in the present case he had made a proper finding as to the evidence and a correct application of the law. In other words, he was right in amending both the charges at this stage. There was no question of usurping the functions of the Attorney General. It was only a matter of differences in opinion between the learned trial judge and the representative of the honourable Attorney General, ie the learned deputy public prosecutor. While he is still holding court and not yet functus officio, the law gives the learned trial judge the right to disagree with the honourable Attorney General and to state his view as the finding of the court. In the present case, he was satisfied that the offence as described in s 21(6) of the Dangerous Drugs Act 1952 had been proved at the end of the case for the prosecution and so he amended both charges as he did and had them read to the accused with the view to take his plea. The accused pleaded guilty to both the amended charges and the learned judge accepted his plea and proceeded to find him guilty and convicted him on both charges and sentenced him as he did.

The next important question is whether the learned trial judge was right in finding that having physical possession of the drug in transit was an offence under s 21(6). When the accused was first brought before the court, the learned deputy public prosecutor preferred him with a charge for the offence of trafficking in 1,846.4gm of cocaine under s 39B(1)(a) of the Act while in transit at gate 13 of Terminal One. The cocaine was found on the accused's body as a result of detection by the walk-through detector just before boarding the plane for Den Pasar. It was not in dispute that he was then in transit. It was the contention of the learned deputy that in view of the quantity of cocaine, the offence of trafficking had been committed by the accused even though he was in transit. He cited a Singapore case, the case of *Lau Chi Sing v PP* [1989] 1 MLJ 5 where the accused was charged with the offence of trafficking in 242.85gm of diamorphine under s 5(a) of the Misuse of Drugs Act. The accused, a Hong Kong national, had arrived in Singapore from Kuala Lumpur and had checked into Ghim Peng Hotel at Geyland Road. At about 7.30pm on the same day, he checked out of the hotel and took a taxi to Changi Airport. There he checked in for his flight to Amsterdam after which he was arrested. He was convicted for the offence of trafficking ie by way of transporting the drug from the hotel to the airport in a taxi without any authorization. The second Singapore case cited before us was the case of *Ng Kwok Chun & Anor v PP* [1993] 1 SLR 55. In this case, the appellants were arrested in the transit lounge of Changi Airport after their arrival from Phuket, Thailand. They were to leave for Brussels the same night. A total of 4,838.5gm of diamorphine was found in a number of bags strapped to

their legs. They were charged with the offence of 'importing' the drugs under s 7 of the Misuse of Drugs Act (Cap 185) and convicted. There is no doubt in both cases the appellants were on their way to other countries. In the one case, the appellant was on his way to Amsterdam while in the other they were to leave for Brussels. The word 'traffic' is defined under s 2 of the Misuse of Drugs Act of Singapore and it means, inter alia, 'to transport'. This explained why Lau Chi Sing was convicted on a charge of trafficking. However, the definition of the word 'traffic' in the Misuse of Drugs Act of Singapore does not include the act of importing or exporting. To import or export is a separate offence in Singapore and it is provided for under s 7. Section 7 reads:

> Importation and exportation of controlled drug
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> Except as authorized by this Act or any regulations made thereunder, it shall be an offence for a person to import into or export from Singapore a controlled drug.

In Malaysia, while separate offences of exporting and importing are provided for in the terms as spelt out in ss 19 and 20 of the Act, the definition of 'trafficking' as found in s 2 also includes the acts of exporting and importing. The provisions in our Dangerous Drugs Act 1952 are not in pari materia with those in the Misuse of Drugs Act of Singapore, particularly in regard to offences.

Again our Dangerous Drugs Act 1952 makes provision for an offence while in transit as is provided in s 21(6). For ease of reference, I reproduce below s 21 in full thus:

> Dangerous drugs in transit
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> (1) No person shall bring any dangerous drug to Malaysia in transit unless —
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> (a) the drug is in course of transit from a country from which it may lawfully be exported, to another country into which such drug may lawfully be imported; and
>
> (b) except where the drug comes from a country not a party to the Convention, it is accompanied by a valid and subsisting export authorization or diversion certificate, as the case may be.
>
> (2) Where any dangerous drug in transit is accompanied by an export authorization or diversion certificate and there are reasonable grounds for believing that such authorization or certificate is false, or that it has been obtained by fraud or wilful misrepresentation of a material particular, it shall be lawful for the Minister, or any officer authorized by him in that behalf, to seize and detain the drug to which such authorization or certificate relates.
>
> (3) Where the dangerous drug in transit is not accompanied by an export authorization or diversion certificate by reason of the fact that the drug comes from a country not a party to the Convention and there are reasonable grounds for believing that such drug is being conveyed in an unlawful manner or for an unlawful purpose or is in course of transit for the purpose of being imported into another country in contravention of the laws of that country, it shall be lawful for the Minister, or any officer authorized by him in that behalf, to seize and detain the drug.

(4) Where a dangerous drug brought into Malaysia in transit is landed, or transhipped in Malaysia, it shall be stored and dealt with as the Minister may direct and shall be moved only under and in accordance with a removal licence granted in pursuance of section 22.

(5) Nothing in this s shall be deemed to apply to any dangerous drug in transit by post or in transit by air if the aircraft passes over Malaysia without landing, or to such quantities of dangerous drugs as may reasonably form part of the medical stores of any ship or aircraft.

(6) Any person who brings any dangerous drug into Malaysia in transit otherwise than in accordance with the provisions of this section shall be guilty of an offence against this Act, and shall be liable on conviction to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

There is however, no similar provision in the Misuse of Drugs Act of Singapore.

We shall now focus our attention closer to home and decide whether in Malaysia, it is possible to charge a person with the offence of trafficking under s 39B when he is found with the drugs while in transit as in the case before us. The learned deputy insisted that it was possible when we asked him that if it was so possible on the same facts as in the case before us, why was it necessary to provide for a separate offence while in transit. We saw that he was at pains to give a reasonable explanation. We observed that perhaps it was because there was no similar offence in Singapore law that the charge for trafficking could legally be supported there even when the person who carried the drug was in transit.

Our Dangerous Drugs Act 1952 defines the term 'in transit' as found in s 2 thus:

> 'in transit' means taken or sent from any country and brought into Malaysia by land, air or water (whether or not landed or transhipped in Malaysia) for the sole purpose of being carried to another country either by the same or another conveyance.

Of course, as we have pointed out, it is an offence for anyone to export from Malaysia (s 19) or import into Malaysia (s 20) any dangerous drug without being in possession of a valid authorization or licence. It is equally an offence for anyone who 'brings any dangerous drug into Malaysia 'in transit' otherwise than in accordance with the provisions of s 21. By definition, a drug 'in transit' means 'taken or sent from any country and brought into Malaysia' by land, air or water 'for the sole purpose of being carried to another country.' To qualify for the drug to be 'in transit', it must come from a country outside Malaysia 'for the sole purpose of being carried to another country.' In the terms of the 'purpose' being 'solely' for carriage to another country, it must mean that there shall not be any local distribution or consumption of the drug by any local resident or anyone at all within Malaysia. To be guilty for an offence in transit under sub-s (6) of s 21 there must be a breach of the provisions of sub-s (1) of the said section. Perhaps it may be of interest to note that the Act makes no express mention as to whether the person in possession of the drug must also be

'in transit' in the context of the immigration laws. Perhaps the word 'bring' appearing in sub-s (1) is capable of giving such an interpretation. However, this was not a subject for contest in the present case, for it was not disputed that the accused before us was clearly 'in transit'. Now to offend against sub-s (1), the person who brings the dangerous drug is not in possession of a valid export or import authorization. In other words, it is not accompanied with a valid export authorization from a foreign country exporting it to another country outside Malaysia and at the same time it is also without a valid import authorization from the other country. Subsection (2) on the other hand merely gives the relevant Minister or any officer properly authorized by him, the power to seize and detain the drug in transit if he has 'reasonable grounds for believing' that the accompanying authorization or diversion certificate is false or that it has been obtained by fraud or wilful misrepresentation of a material particular. If after investigation, he is satisfied that the authorization is valid or that it has not been obtained by fraud or misrepresentation he shall then release the drug. Subsection (3) gives the Minister or any authorized officer the power to seize and detain the drug if it is not accompanied with a valid authorization or diversion certificate and that the drug comes from a country not a party to the convention. While sub-s (4) stipulates that if the drug in transit requires storage for the time being, it shall only be 'stored and dealt with' on the direction of the Minister and it can only be moved in accordance with a removal licence granted under s 22.

In the present case, the drug was not accompanied with any form of authorization papers, and there was no evidence that the drug was physically being distributed anywhere in the airport before the arrest or for the purpose of distributing locally. He was found in possession of the drug when he was about to board the aircraft that was bound for Den Pasar. The learned deputy even suggested that as the drug was found hidden on the body of the accused, he must have intended to traffic in the drug. There is no such presumption in the Act however. The Act neither stipulates nor describes the manner by which the drug is to be brought or carried into the country. Perhaps it may even be argued that because the accused had the drug hidden he did not want it to be detected because he wanted solely for the purpose of carrying it to another country in this case (Indonesia). So there was no intention to traffic in Malaysia.

The next question is whether the presumption of trafficking under s 37(da) of the Act is attracted in view of the amount involved. When a dangerous drug is 'in transit', in our view, the amount is irrelevant because it is completely a different kind of act and therefore a different kind of offence. It is an offence of being 'in transit' without being accompanied with a valid authorization. The amount of the drug involved ought not and should not make any difference as to the character of the act. The very language determines the issues. As we have earlier observed that the meaning of being 'in transit' is for the 'sole purpose' of being carried to another country and therefore, Malaysia will not be a country where the drug will be distributed and consumed and as such, the presumption of trafficking cannot arise. Perhaps there is wisdom in the legislature for

having incorporated the offence of being 'in transit' because realizing that the local populace will not suffer the consequence of distribution and consumption at the hands of the carrier, the carrier need not suffer the stringent application of our law. To deprive him of the drug by seizure accompanied by a small penalty would be more than sufficient.

Now, with regard to the sentence imposed, the learned deputy submitted that if he failed to convince this court that in law the presumption under s 37(da) could be attracted in a case where a person who brought any dangerous drug into Malaysia 'in transit', his other option is to submit that this court would consider invoking s 39A(2) of the Act in view of the amount of cocaine being more than 15gm in weight as stipulated in para (e). We certainly appreciated his anxiety in that if we failed to do so, then there would be a possibility that Malaysia would become a popular transit point for traffickers. His submission is supported by the reading of sub-s (2) of s 39A which states:

> Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offence is —

and the operative words being 'found guilty of an offence against this Act' and that the accused in the present case has been found guilty 'of an offence against this Act' and rightly therefore, there is a case for imposing a penalty higher than that which already has been handed out by the trial judge. For ourselves, having found the offence of bringing a dangerous drug in transit under s 21(6), the presumption of trafficking cannot be invoked for the above stated reasons; while the Act has provided only one form of penalty as found in s 21(6), we were in serious doubt whether s 39A(2) can be applied. In the circumstances, we gave the benefit of that doubt to the accused and accordingly we dismissed the appeal and confirmed the sentence.

Appeal dismissed and sentence confirmed.

Reported by David Lai